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Supreme Court of the United States

October Term, 1954

No. 473

GULF OIL CORPORATION,

Appellant,

against

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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December 17, 1954

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The appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the ground that it seeks to bring up for review a non-final determination.

Statement

This is an appeal from a determination of the New York Court of Appeals, entered on July 14, 1954, which reversed a determination of the Appellate Division of the New York Supreme Court and remitted the matter to the Comptroller of the City of New York for further proceedings not inconsistent with the opinion of the Court.

The Comptroller, after conducting formal hearings, had denied the appellant's application for a refund of taxes

paid on an allocated basis pursuant to the New York City General Business and Financial Tax law. The appellant thereupon instituted a proceeding pursuant to Article 78 of the New York Civil Practice Act (in the nature of certiorari) to review this determination. The New York Supreme Court, in accordance with the provisions of the Civil Practice Act, transferred the proceeding to the Appellate Division of that Court. The Appellate Division confirmed the determination of the Comptroller.

An appeal was then taken to the New York Court of Appeals. The Court wrote an opinion in which it held that, since the appellant was engaged in both intrastate and interstate commerce in New York City, it was proper to include in the measure of the gross receipts tax, imposed for the privilege of doing business in that city, a share of the receipts from interstate sales which is properly attributable and allocable to the doing of business therein. The Court, however, went on to hold that the allocation formula used by the Comptroller did not fairly measure that part of the interstate receipts which is properly attributable and allocable to the doing of business in the city. The Court, without specifying the nature of a proper formula aside from pointing out that the use of arbitrary minimum provisions is improper, reversed and remitted the matter to the Comptroller for further proceedings.

The appellant thereupon moved in the New York Supreme Court for, and despite appellee's opposition obtained, an order supplementing the record on appeal by adding thereto a "commitment and undertaking" that, should this Court take jurisdiction of the appellant's forthcoming appeal and affirm on the merits of the federal questions, the appellant would not take or attempt to take any further appeal herein to the United States Supreme Court

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regardless of the disposition thereafter made in the New York courts of any federal or non-federal question that might arise in subsequent proceedings (Jurisdictional Statement, Appendix B, p. 40).

After this order was entered the appellant applied to the New York Court of Appeals for an amendment of the remittitur to state that only federal questions were presented to that Court. The affidavit in support of this application referred to the order described in the prior paragraph. Nevertheless, the Court of Appeals refused to amend the remittitur on the ground that "the order of this court (see 307 N. Y. 342) is not a final determination within the meaning of 28 United States Code, section 1257."

ARGUMENT

The New York Court of Appeals having remitted the matter to the Comptroller for further proceedings involving the exercise of discretion, the appeal is from a non-final determination.

This appeal has been taken pursuant to 28 U. S. C. §1257 and, therefore, should be dismissed unless it seeks to bring up for review a final determination. Although the New York Court of Appeals held that there was a right to tax the appellant, it remitted the matter to the Comptroller of the City of New York for further proceedings. This remission was based on a determination that the allocation formula employed was invalid and it directed the Comptroller to make a fair apportionment. The Court did not specify the method for reaching such a fair apportionment. It is, therefore, obvious that the remission required the Comptroller to exercise discretion in determining a fair method of apportionment. The

amount of tax due cannot be determined until this new method of apportionment is devised by the Comptroller. There is not the slightest basis for treating the action required of the Comptroller as merely ministerial.

The fact that one of the two major issues has been decided does not meet the requirement of finality. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948). This would appear to be particularly true where the remaining issue, the question of fair apportionment, involves a federal question.

This case does not involve the type of situation which has caused this Court to treat as final for review purposes determinations which for other purposes would be deemed interlocutory. Here the appellant will not be irreparably damaged if review is not immediately available. Nor does the determination appealed from decree an immediate transfer of physical property with merely an accounting to follow.

A situation somewhat similar to the case at bar was involved in *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U. S. 398 (1938). In that case the Supreme Court of Missouri had affirmed a determination of the Circuit Court which had affirmed an order of the Public Service Commission fixing the value of a utility company's property for rate making purposes and ordering a reduction in rates. Although it affirmed the judgment, the Missouri Supreme Court directed the Circuit Court to remand the matter to the Public Service Commission to rehear and redetermine the facts on four specified points. An appeal to this Court was dismissed on the ground that it was not taken from a final judgment. It was pointed out that the action required of the Public Service Com-

mission involved the exercise of discretion and might constitute the basis of another appeal. See, also, *Martinez* v. *International Banking Corp.*, 220 U. S. 214 (1911); *Arnold* v. *Guimarin & Co.*, 263 U. S. 427 (1923); *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

The determination of the New York Court of Appeals does not acquire finality simply because a review of the determination by the Comptroller upon the remand may require the institution of a new Article 78 proceeding. In COHEN & KARGER, *Powers of the New York Court of Appeals* (1952), it is pointed out that (§77, p. 337):

> "The two Article 78 proceedings are really only related stages of a single proceeding in the nature of an appeal from the administrative agency's determination."

Under New York practice a similar remand to an administrative body by the Appellate Division is treated as a non-final order. *Matter of N. Y. State Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32 (1932); *Matter of Bengent* v. *Noyes*, 284 N. Y. 229 (1940); *Matter of Restaurants Longchamps* v. *O'Connell*, 296 N. Y. 239 (1947); *Matter of Rochester Gas & Electric Corp.* v. *Maltbie*, 298 N. Y. 103 (1948). In fact, such a remand in a tax case involving an analogous New York City tax was treated as not being final. *Matter of Brooklyn Union Gas Co.* v. *Joseph*, 297 N. Y. 469 (1947). [See explanation of this case in COHEN & KARGER, *Powers of the New York Court of Appeals*, §12, p. 52.]

It would seem evident that the appellant can not transform the non-final determination appealed from into a final determination by its apparently novel "commitment and undertaking" that it will not appeal to this Court

from the ultimate final determination. As we have noted, that ultimate determination will also involve a federal question with respect to the allocation formula, and the "commitment and undertaking" does not prevent the appellant from having that question reviewed by the New York Courts. Moreover, after such a review the appellee herein, should the determination therein be adverse to him, may be able to bring the matter to this Court. Thus there is a federal question which may be presented to this Court which is not now ripe for adjudication.

It may be observed that what the appellant has attempted to do by its "commitment and undertaking" is different from the stipulation for judgment absolute under Section 588, subdivision 3, of the New York Civil Practice Act. Upon an affirmance after such a stipulation, the Court must render judgment or order absolute against the appellant. (COHEN & KARGER, *Powers of the New York Court of Appeals*, §69, p. 303).

In conclusion it should be noted that the case of *Gerosa* v. *United Piece Dye Works* (Docket No. 461) is not, as appellant asserts, a companion case. It is simply another case arising under the same tax law and involving another aspect of the application of the Commerce Clause.

We respectfully submit, therefore, that the appellant has appealed from a determination which is not final and that the appeal should be dismissed.

Dated: New York, N. Y., December 17, 1954.

ADRIAN P. BURKE,
STANLEY BUCHSBAUM,
Counsel for Appellee.